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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1142

BRYAN MELTON and wife, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

Petitioners,

vs.

CORLEY R. YOUNG, MRS. C. M. HOOPER, REV. H. H. BATTLE, JAMES L. JENKINS, G. PAUL SAMS and WILLIAM D. LEBER, The Board of Education of Chattanooga, Tennessee, S. DEAN PETERSEN, Commissioner of the Board; DR. B. L. VON SCHAAF, Principal of Brainerd High School, Chattanooga, Tennessee,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents accept Petitioners' statement of jurisdiction but cannot accept their statement of the question presented or statement of the case.

QUESTION PRESENTED

Whether the suspension of a student at Brainerd High School for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was violative of

the First and Fourteenth Amendments to the United States Constitution under the circumstances shown to have been existing within the school at the time of such suspension.

STATEMENT OF THE CASE

From 1966 until the opening of school in 1969, Brainerd High School in the City of Chattanooga had undergone a gradual transition from an all white school to a desegregated one. The student body had previously adopted as the school nickname the name "Rebel" and a custom had developed of using the Confederate flag as the school flag and the song "Dixie" as the school pep song. Commencing with the opening of school in the fall of 1969, a series of events occurred which ultimately led to serious disruption within the school, resulting in the closing of the school upon two occasions in the spring of 1970, and further led to disruption throughout the City of Chattanooga, resulting in a city-wide curfew being imposed in an effort to abate racial tensions and to restore order. [App. p. 18a]* The use of the Confederate flag as a school symbol and the song "Dixie" as a school pep song was the focal issue in all of the disturbances. [App. p. 18a-19a]

The first overt sign of student discontent appeared when a number of black students walked out of a school pep rally in September of 1969, to protest the use of the Confederate flag and song "Dixie." The black students in ever increasing numbers continued to walk out of pep rallies until on October 3, 1969, *all* of the black students walked out of a student pep rally, again protesting the continued use of the flag and song. At a school football

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* "App. —" refers to the appendix of Petitioners' petition for writ of certiorari. "P.I. —" refers to the preliminary injunction hearing. "T.T. —" refers to the transcript of trial. "S.F. —" refers to the stipulation of facts agreed to by the parties.

game on the evening of October 3, 1969, a serious confrontation occurred when a group of black students left their seats in unison at halftime and went upon the playing field, and there attempted to burn a Confederate flag. Police action was required to restore order. [App. p. 19a; S.F. sec. I para. (2), (3), (4), (6), (8)]

Thereafter, the student body continued to polarize along racial lines as the black and white students generally took contrary positions with reference to the continued use of the flag and song within the school.[1] On October 8, 1969,

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[1] The petitioners have made an effort to depict the school protest as one involving only official school symbols as contrasted to the personal wearing of such symbols; however, the record clearly reflects that the students' feelings and protests went beyond this official use only. For instance, at the trial Dr. Claude Bond, an assistant superintendent, testified as follows:

Q. Have you heard the black students discuss their reaction to the song Dixie? A. Yes. Q. What is the reaction of the black students to the confederate flag? A. Well, most of the ones that I have heard make comments about it was during the time we were having trouble at Brainerd last year and I met with them on one or two occasions at the invitation of the principal to try to get them to go back to school, back to class, and they were voicing their sentiment about the Rebel flag and Dixie and a whole gamut of concerns. Q. What were their concerns? A. Well, they felt that the white students were using this as a provocative way to indicate to them that they did not want them to be a part of the school and this was their way of saying to them, "We don't want you to be here." And they used the flag, this is the students' idea now, that they used the flag and as a thing that they retaliated by using the Black Fist and this kind of thing. [T.T. p. 46 & 47]

Alma Barnett, a black Brainerd student involved in the prior year's disruptions, testified as follows:

Q. Do you think white children should have a right to wear a Confederate emblem on the sleeve of their jackets? A. To school? Q. Yes. A. Not at Brainerd High School, I don't. Q. Why? A. Because the symbols have been used heretofore as a source of irritation and aggravation towards blacks and to wear them now would be, it would mean the same thing and for this to go — we can't possibly learn, the atmosphere would be too tense and the learning process could not

approximately 1,000 white students walked out of the school in protest over rumors that the use of the flag and song were to be discontinued at the school. The controversy then spread throughout various parts of the City. Motorcades, displaying Confederate flags moved throughout the area on October 8, and thereafter and, in addition, public rallies were held in the Brainerd area on various occasions. Parents joined in protest at a school board meeting and some reported incidents of threats and physical assaults having occurred at Brainerd High School. In an effort to prevent the rising tide of racial disturbances, the City imposed a city-wide curfew that ultimately continued from October 13 through October 17, 1969. [App. 19a-20a; S.F. sec. I, paras. (9), (15), (16), (17), (21), (24), (26), (29), (33), (36)]

Throughout the remainder of the fall semester, Brainerd continued in a racially tense atmosphere. Nighttime athletic events were rescheduled. Sporadic fighting occurred between students of different races. Many students were suspended from school. [App. 20a]

In January of 1970, a new principal, Dr. Billy L. Von Schaaf, was assigned to the school and a number of steps were taken to tighten discipline within the school; however, during the spring of 1970, racial incidents continued

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exist so, therefore, I don't think that they should be allowed to wear them at Brainerd. Q. Because the flag is forced on your eyesight, is that what you are saying? A. No, because it was used to irritate and aggravate. Q. I say, were you compelled to look at it? A. This was not why I was irritated by it, because I had to see it, it was the way it was used. Q. How was it used? A. Well, it was used — well, like in this individual instance, like it was waved in front of blacks' faces and it was worn by those who called me, personally called me names, names that were offensive to me, and I hadn't any used before, before the Brainerd, you know, situation, I hadn't seen it used offensively. Q. You are saying not the flag but how it is used? A. Yes. Well, the flag itself represents something offensive but the way that it was used represents something even more offensive. [T.T. pp. 96 & 97]

to occur at the school and racial tensions continued to mount until on April 14, 1970, a major confrontation occurred between the black and white students. Some 40 policemen were required at the school to restore order and some 9 students were arrested upon this occasion. On the following day, the racial trouble continued. Two fires of undetermined origin were discovered and extinguished in the school auditorium. Again, it was necessary to utilize as many as 40 policemen to restore order at the school and to patrol the school corridors and halls. The situation became so tense that it was necessary to close the school for the following 2 days. When classes resumed the following week, racial turmoil promptly broke out again, resulting in protests, fights, rock throwing and other destructive actions. On April 22, 1970, the situation became so tense that the police present at the school had to request reinforcements in order to maintain order and a total of approximately 50 policemen were needed for this purpose. The school was again closed for the remainder of the week and full classes did not resume at the school until 8 days later on April 30, 1970. The Board of Education met each day from April 22 through April 27, and at their meeting on April 27, they authorized the Superintendent to request the National Guard at Brainerd High School when and if he in his discretion determined such to be necessary. From April 30, 1970, until the close of school, many regular school activities were curtailed or omitted entirely and numerous minor conflicts and incidents continued to occur between the students. The suspension rate at the school ran as high as 35 to 40 students at a time. [App. 20a-22a; S.F. sec. I para. (39), sec. II para. (1), (2), (3), (4), (6), (7), (8), sec. VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI]

Throughout the year many students wore Confederate symbols on their attire under the pretext that they were

the official school symbols. Therefore, the black students' protest was generally directed against the symbols as official symbols. However, efforts were made to curtail this wearing of personal symbols and some complaints were directed to this type of conduct.[2]

In the latter part of May, 1970, a biracial committee of 9 prominent citizens was appointed by a joint action of the school administration and the Brainerd High School PTA for the purpose of reviewing the problems besetting the school and recommending means of alleviating some of the tenseness within the school. After an extensive investigation, the committee identified 7 factors having been most significant in contributing to the tensions and disorders during the previous school year, and recommended the elimination of the use of the Confederate flag as a school symbol, and the use of the song "Dixie" as a school pep song. Their recommendation was accepted by the Chattanooga Board of Education. Thereafter, the students and parents of the school were advised prior to the opening of school in 1970 that "The Confederate flag and Con-

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[2] Ray Coleman, former Brainerd High School principal, testified as follows:

Q. None of the black students ever objected to this sort of attire? A. Yes, on one or two occasions. I had, after some demonstrations in the community related to the Confederate flag, I had appealed to the students not to wear the symbols during the regular school day and that there was a possibility that they would be accused of doing something that we felt that outsiders were doing in using the symbols, if they truly felt it was a symbol of the school that we would refrain from using it in the school and not utilize it unless it was an athletic contest or pep rally.

So most of the students cooperated but I did have one or two occasions where a black student would point out some student was wearing a flag or a white student would point out a black student was wearing a black fist of some sort, but it was very minimal, they were very cooperative in trying to refrain from utilizing them during this period. [T.T. p. 513-514]

federate soldier cannot be used as symbols for any public school in Chattanooga; therefore, all displays of the flag and soldier are removed from the school premises and cannot be used in any display where Brainerd is involved." [App. p. 22a-23a]

Prior to the opening of school in the latter part of August, 1970, elaborate preparations and orientation sessions were held at Brainerd High School in an effort to prepare the school for a peaceful opening and to advise the students of the implementation of certain new school policies including the adoption of a new code of conduct which banned the wearing of provocative symbols at the school. Dr. Von Schaaf and other responsible persons knew that the elimination of the Confederate flag and song "Dixie" as official school symbols by the school board was not a panacea. They anticipated and had every right to anticipate that a tense racial situation would continue to exist at the opening of school in September of 1970.[3] [App. p. 23a; S.F. sec. IV para. (3); T.T. p. 373-382]

Though there was grave concern about possible racial

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[3] For instance, Dr. Von Schaaf testified as follows:

Q. Have you detected, Dr. Von Schaaf, in your confrontations at Brainerd any attitude of dissatisfaction among the white students for their not having their customary symbol this whole year? A. I have detected quite a bit. [T.T. p. 477]

McClellan Cook, then President of the Brainerd PTA and subsequent member of the Chattanooga Board of Education, testified as follows:

A. And we were all very uneasy when school opened concerning the pep rallies and when you have bitterness in feelings that result from incidents of these types you just don't wipe the slate clean and start all over, and so the deep concern was to try to prevent an incident from occurring which could provoke and cause escalation, renewing or re-opening the wounds and renewing the conflict, but it takes time, it takes a lot of time for these things to work themselves out. [T.T. p. 203-204]

conflicts at the first football game to be held prior to the opening of school, all such conflicts were averted.[4]

On September 8, 1970, the plaintiff, Rod Melton, attended school wearing a jacket with an emblem sewn on one sleeve depicting the Confederate flag. During the morning this matter was called to the attention of Dr. Von Schaaf by a faculty member and he promptly requested that Rod either remove the emblem or cease wearing the jacket while

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[4] Dr. Von Schaaf testified about this matter as follows:

Q. Did you receive any reports with reference to the use of the Confederate flag and the first football game in September of 1970? A. Several people said that at the first ball game we would probably have a thousand Confederate flags present and, of course, we were apprehensive about this, not only did we have this kind of rumor floating about, we also had a rumor that if there was going to be a thousand Confederate flags that there was going to be a massive group of black people ready to retaliate. [T.T. p. 374]

Q. Were many Confederate flags in evidence at the Howard football game? A. I saw only two or three Confederate flags. Q. Could you identify any of the persons that were using or that had the Confederate flags in their possession? A. Yes, Mrs. Melton, Rod, Rick Cooper, and I believe there was one other boy, I don't recall. Q. Then this was about a week prior to September the 8th, approximately. After you made the decision to limit the use of the Confederate flag at football games, did you make any preparations to be able to enforce this restriction? A. Yes. We hired additional police on more than one occasion. We felt like that we might have to have more policemen present on the situation than we normally had.

We were fortunate in one sense of the word that in the early games of the year, not as many black students attended the ball games as had normally attended the ball games and this lessened the degree of conflict to some measure, but we did have extra policemen on duty for these ballgames. [T.T. p. 382-383]

McClellan Cook testified as follows:

Q. Do you recall that Howard High — Brainerd football game in September of 1970? A. Yes, sir. Q. Did you have any concerns about this game? A. I was scared to death. Q. Why? A. I knew the feelings of the white community and the white students over the loss of Dixie and the flag and I feared that there would just be thousands of flags show up at that ball game and blow the whole thing up again. [T.T. p. 225-226]

attending school. Rod declined to do so and was allowed to return to class. Thereafter, further complaints were received from both the faculty and students regarding his being allowed to wear the Confederate emblem in school.[5] Dr. Von Schaaf thereupon offered Rod the choice of removing the jacket or leaving the campus. Rod elected to leave the campus. [App. p. 24a; S.F. sec. IV para. (1), (2)]

The next day, Rod again appeared at school wearing the same jacket with the Confederate symbol sewn on the sleeve. The principal again extended the same choice to Rod and Rod promptly elected to leave the campus. On each occasion Dr. Von Schaaf had determined that to allow Rod to continue to wear the Confederate symbol at school would result in substantial disruption of the educational process and would sooner or later if allowed to continue result in acts of violence followed by possible physical injury to members of the student body. [App. p. 24a-25a; S.F. sec. IV para. (1), (6)]

Rod's avowed purpose in wearing the symbol to school was to "show that the Confederate flag has not been done away with" and to show he "was proud of" his Confederate heritage. [P.I. p. 4, 8-9] He was known to the black students at Brainerd High School and had been involved on more than one occasion in racial incidents. He had been present at many of the events that occurred in the previous year at Brainerd and he had been suspended from school during that year for wearing an outer garment bearing a symbol of the Ku Klux Klan. He was involved

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[5] Two assistant principals reported to Dr. Von Schaaf that they had received complaints from both members of the student body and faculty. One assistant principal reported receiving complaints from approximately 6 to 10 black students to the effect that they could see no reason why Rod would wear the Confederate symbols unless it was to alienate them. [S.F. sec. IV para. (1), (2)]

in the separation of black and white girl combatants on two occasions and on each occasion he was accused of being overly rough with the black girl involved. In addition, he commenced a book report in class by stating that the author had scientific proof that Negroes as a group had smaller brains than whites and were less capable of learning. On another occasion subsequent to the opening of school in 1970, he purposely marred an art exhibit of a black student. [App. p. 24a; S.F. sec. IV para. (10), (11); T.T. p. 386-391]

During the early part of the school year in 1970, Dr. Von Schaaf managed to avert any serious racial disturbances. However, on one occasion the white students did engage in an active protest against the school symbols having been banned.[6] Also, racial tensions increased as a result of several incidents where some black students' automobiles were maliciously damaged.[7]

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[6] Dr. Von Schaaf reported the incident as follows:

Q. Has there been any demonstration by whites in favor of the Confederate flag this year, not in the school but near the school? A. Yes. Q. Tell me about that. A. Oh, back early in the fall, a group met across the street from the school in a parking lot and started a motorcade with Confederate flags. I drove back to school and they were parked on the street leading to a sewage plant on the other, I guess it would be the west end of the school, and they asked me to come out and talk to them and I said, "If you want to talk to me, come on the school grounds, I would be glad to talk to them." They asked if they could come and talk to me the next morning. I gave them permission to come in to talk to me. They came in and said they wanted to raise a protest to get the Confederate symbols back and asked what they could do, and I said, "The board has passed a ruling which the board will have to rescind. Now, if you will get your parents to accompany you, I will ask for an audience before the Board of Education for you to make your statement." [T.T. 484-485]

[7] Dr. Von Schaaf testified about the incident as follows:

A. Yes, several tires were punctured and cut during the, I believe it was in October, the latter part of October or the first of November. Q. What was the black students' reaction to this situation? A. They

The Respondents accept the Petitioners' statement of the case commencing with the last paragraph on page six of their brief and continuing through page seven thereof.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision of the Court of Appeals is consistent with applicable decisions of this Court, and particularly *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker* is grounded upon the fact that no disruption of the educational process was reflected in the record before the Court. The evidence is substantial that there were no facts upon which to base a suggestion of a *potential* for disruption.

> "There is no indication that the work of the schools or any class was disrupted." (p. 508, *supra*)
>
> "In the present case . . . our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." (p. 509, *supra*)

The same factual conclusion is referred to repeatedly in the opinion. Repeated substantial disruptions occurred at

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accused Rod several times of it to me and to the assistant principal. [T.T. p. 387]

Alma Barnett testified about the incident as follows:

Q. Did the tensions rise at any time during the first of the year? A. Yes. Q. What happened? A. Well, there were several incidents on the campus where the tires on the black students' cars were cut on the parking lot and after this tension somewhat rose again and then later certain students' cars were destroyed in their own yards, you know, during the night, and then after that tensions rose greatly. [T.T. p. 105]

Brainerd High School. Potential for disruption pervaded the school environment.

The Petitioners' manner of phrasing the first issue requiring resolution by this Court admits that there are possible factual situations which would justify a school official in imposing a restriction upon the expressive activity of a student such as used by Rod Melton. Petitioners desire this Court to clarify (and specify) the factual conditions which would provide constitutional justification for suppressing speech on a school campus.

However, the *argument* of Petitioners emphasizes (1) the participation by Petitioner (Melton) as well as (2) the substantial disturbance as two absolute prerequisites to permitting a school official to limit student speech. *Tinker, supra, Healy* v. *James,* 408 U.S. 169, 92 S.Ct. 2338 (1972), and *Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972), are cited in support of this interpretation.

Tinker cannot be authority for this interpretation since there was no disruption in *Tinker;* and with no disruption, there was obviously no participant in something that never occurred.

The facts in *Healy* clearly indicate the absence of material disruption, while at the same time indicating that the Court would probably have come to a contrary conclusion if the record had supported the presence of a substantial disruption. At page 2350:

> "The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a *substantial threat* of material disruption in violation of that command the President's decision should be affirmed." (Emphasis ours)

Then again at page 2351:

> "Dean Judd's remark reaffirms, in accord with the full record, that there was no substantial evidence that these particular individuals acting together would constitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of 'undifferentiated' fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Independent Community School District, 393 U.S., at 508, 89 S.Ct., at 737."

Then again on the same page:

> "As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not."

Thus this Court continues to disapprove of limitations upon expressive activity *unless* the facts show a substantial disturbance or a threat of such. Refusal to permit restrictions upon speech where there is no disruption, nor substantial threat of such, authorizes the restrictions where the facts are contrary. This Court's decisions do not condition a school official's right to regulate students upon both the presence of a substantial disruption and the actual participation by the student seeking First Amendment rights in the process of the disruption.

The third case relied upon by Petitioners is *Grayned* v. *City of Rockford, supra.* The Petitioners' characterization of the rule of law enunciated by this case would limit the authority of school officials to intervene "only when that expression merges with conduct by the speaker which materially disrupts classwork or involves substantial disorder or invades the rights of others. . . ." A careful read-

ing of this case does not support the Petitioners' interpretation.

This Court found the two essential ingredients present in *Grayned, supra.* There was a substantial disturbance of the classroom. And *Grayned,* the appellant, participated in the demonstration which caused the disruption. His conviction for violating the ordinance in question was upheld.

No school official was required to predict the result of the conduct under examination in *Grayned, supra.* Such prediction was a necessity in the facts now before this Court.

Petitioners, while appearing (by their statement of the issues) to acknowledge the possibility of a unique set of facts adequate to justify a prediction by school officials of disruption so as to permit a restriction of expressive activity by a student, in reality, use an argument that can only be interpreted to prohibit any school official from using common sense so as to prevent a threatened confrontation and disruption.

If there are two essential ingredients, that is, a substantial disruption coupled with participation by the student in the disruption, then school officials can never act to avoid disruption and racial confrontations because, until the disruption takes place, there can be no participants. Petitioners' reasoning and interpretation of the Constitution would stay the hand of the school official until the disruption has already commenced.

As we understand Petitioners' argument and understanding of the Constitution, (1) an actual disruption would have to take place and then (2) Petitioner (Melton) would have to participate in that disruption. If these two facts were found, then *and only then* would the school officials be justified in limiting the speech of a student. This is

a ridiculous result for under such interpretation school officials who desire to track the Constitution will be compelled to withhold action until the disruption which he is attempting to avoid has already occurred. Certainly there is nothing in *Tinker* or other applicable decisions that would justify limiting school officials to restrictive actions with reference to the freedom of speech to such a limited set of circumstances as is envisioned by Petitioners. The following cases specifically deny Petitioners' interpretation of the authority of school officials:

> *Russo* v. *Central School District Number 1 Towns of Rush,* etc., 469 F.2d 623 (1972) at page 632:
>
> "We add, however, as we did in *James,* that nothing in the First Amendment requires a school administration to wait until disruption has actually occurred before it may take protective action. Conduct which leads, or is likely to lead, to violence in the schools is not to be tolerated."
>
> *Butts* v. *Dallas Independent School District,* 436 F.2d 728 (1971) at page 731:
>
> "We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred."

See also *Guzick* v. *Drebus,* 431 F.2d 594 (1970).

Inherent in the practical operation of both issues I and II as posed by Petitioners, a school official, usually the principal, is called upon to make a judgment. And that judgment must be subjective to a substantial extent. If the principal acts and restricts speech, and no disruption occurs, then his critics will say that the threat was exaggerated. Thus, if he acts and a disturbance does not take place, he exposes himself to the criticism of having acted

precipitously or upon a trivial basis. The principal is placed in the position where it can never be proven that his actions were well founded. If this theory is constitutionally sound, school officials will resolve doubts against restricting free speech on the theory that such is the only way to comply with the First Amendment. The principal ignores what his best judgment tells him should be done, and he does so because this is the only way that he can act consistently with constitutional requirements. The ability to act so as to attempt to avoid confrontations cannot be exercised. Accepted preventive techniques cannot be implemented.

On the other hand, if the disturbance does occur and if the principal has not been restrictive with reference to free speech, and if there is a connection between the speech and the disturbance, the principal will always be second guessed by those who complain that if he had taken firm action promptly, the disturbance would never have occurred. Petitioners took this position in their proof and argument (App. p. 26a).

Once Petitioners' theory is examined, and coupled with the interpretation of recent decisions of this Court, the actual application thereof produces a completely illogical and impractical result.

Respondent also relies upon *Cohen* v. *California,* 403 U.S. 15 (1971), as limiting the extent to which speech can be abridged because of the potential audience reaction to it. The conduct under question occurred in the Los Angeles Court House and not on a high school campus, a factual distinction of substance when free speech is concerned. And no disruption of any nature took place. Nothing in *Cohen* is at odds with the decision of the Sixth Circuit in this case.

Respondents agree with Petitioners that public school

students have the right of freedom of expression. But as Mr. Justice Marshall declared in *Grayned, supra*:

> "But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" (p. 2304)

Respondents also agree with Petitioners that:

> "The national imperative of providing racial equality in education should not be sought at the expense of the First Amendment."

As this Court enunciated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1970):

> "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." (p. 13)

However, the effort must continue and with the structure, organization, personnel and supporters as are available. When a racial confrontation closes a school, there is no educational opportunity in an empty school building. Every effort must be made to avoid and prevent tension of such intensity as to force the closing of a school. This is the initial obligation and responsibility of those educators selected to discharge this responsibility.

The breadth of the authority of school officials is described in the following quotation from *Tinker, supra,* at page 507:

> "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive

> authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. * * * Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."

Thus the balancing responsibility falling upon the shoulders of school officials is identified. Not only is there the right of freedom of speech but there is also the right to an equal educational opportunity. During the 1969-70 school year, there was substantial disruption of classroom activity as a result of the racial tension and with extensive use of Confederate symbols. Dr. Von Schaaf exercised some limitation on Rod Melton but did so only because his judgment and experience indicated that Rod Melton's wearing of the Confederate replica might just well be the spark that would ignite another period of substantial disruption of classroom activity.

The balancing of the constitutional rights of the students was initially a burden upon Dr. Von Schaaf and upon his shoulders alone. He could not avoid a consideration of the possible impact upon the black students at Brainerd in the light of his experience in the previous spring. To perform his legal obligation it was necessary for him to engage in the activity of predicting. Included within the act of predicting was an evaluation of the possible hostile reaction of black students to the school authority officially permitting Rod Melton to wear a replica of the Confederate flag after the same school authorities had decided to prohibit the use of the song "Dixie" and the Confederate flag on the Brainerd campus.

That school authorities are authorized to evaluate and predict possible future events is recognized by *Russo, supra, Butts, supra,* and *Guzick, supra.*

That the nature of limitations upon free speech as constitutionally permissible on a school campus differs from a public street or a public auditorium is generally approved, as is indicated by the following quotation from *Shanley* v. *North East Independent School District Bexar County, Texas,* 462 F. 2d 960 decided June 9, 1972 at page 968:

> "Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms."

The cases relied upon by Petitioners reveal factual circumstances other than on a school campus and are not applicable to the case in question. The public streets were involved in *Gregory* v. *Chicago,* 394 U.S. 111 (1969). A public auditorium was involved in *Terminiello* v. *Chicago,* 337 U.S. 1 (1949). *Cohen* v. *California,* 403 U.S. 15 (1971) reflected speech in the halls of the Los Angeles Court House. The South Carolina State House grounds were involved in *Edwards* v. *South Carolina,* 394 U.S. 111 (1969). The holdings in the above cases and the language reflected in these opinions, cannot be divorced from the fact that the environment of the classroom was not before the Court.

Individual acquiescence and self discipline are a necessary part of the classroom atmosphere if learning is to take place.

The substantial disruption that took place in the spring of 1970 at Brainerd High is an essential part of the fact situation before the Court. The substantial disruptions that took place did close the school, and did terminate, during the period that the school was closed, any educational opportunity for the black and white students at Brainerd. Thus clearly, the substantial disruption aspect amounts to and is equated with a complete denial of an educational opportunity and reflects an actual intrusion upon the rights of the students attending Brainerd High. This is in sharp contrast with the following quote from *Tinker, supra,* at page 508:

> "Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."

For this reason, the following cases cited by Petitioners do not support Petitioners' interpretation because there was no evidence of a substantial disruption evident in the facts set forth in such cases, and there was no likelihood of a substantial disruption. Included within this category are *Williams* v. *Eaton,* 468 F. 2d 1079 (10-31-72); *Butts* v. *Dallas Independent School District,* 436 F. 2d 728 (1-14-71); *James* v. *Board of Education of Central District Number 1,* 461 F. 2d 566 (5-24-72); and *Russo* v. *Central School District Number 1 Towns of Rush,* etc., 469 F. 2d 623 (1972).

The particular and peculiar factual situation existent at Brainerd High School in September of 1970 is the only issue in this case.

As was said in *Shanley, supra,* page 975:

> "As we have made clear in this opinion, the balancing of expression and discipline is an exercise in judgment for school administrations and school boards, subject only to the constitutional requirement of reasonableness under the circumstances."

And where reasonable minds may differ in this balancing of constitutional rights, school authority decisions will govern. *Butts, supra,* at page 732:

> "Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extingish, unless they find the circumstances *allow them no practical alternative.* As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination." (Emphasis ours.)

Tinker reflected only apprehension of disturbance by the school authority and "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." (p. 509)

The Petitioners agree with the factual conclusion of the dissenting opinion in the Court of Appeals decision to the effect that Dr. Von Schaaf over-reacted to the facts at his school as they existed on September 8, 1970.

While constitutional issues place a responsibility upon this Court to examine the facts on the record independently of the findings of the trial and appellate courts, we doubt the wisdom of a fourth official evaluation of a set of facts occurring in an environment that existed only at Brainerd High School in Chattanooga, Tennessee, on September 8, 1970. And this fourth look at the facts is the heart of petitioners' argument.

Neither Dr. Von Schaaf nor defendant Chattanooga Board of Education lays any claim to infallibility in perceiv-

ing and judging facts on a school campus as a probable prelude to a substantial disruption of the educational process. But they are not without actual experience. And there is no question but that Dr. Von Schaaf's decision was subjective. But, how else was he to make a decision? That an official decision is partially subjective does not make it automatically unconstitutional.

Dr. Von Schaaf was specially selected by the School Superintendent to take over as principal of Brainerd High School in mid-year, an unprecedented administrative reorganization, but demanded by the environment at Brainerd. He had been specially educated to perform the function of high school principal. His years of actual experience supported his qualification to make the subjective decisions normally required of all high school principals.

As was recognized by this Court in *Swann, supra,* nothing prepared high school principals for the unique circumstances incident to desegregating a formerly all-white high school under Court order and against the desires of the vast majority of taxpayers who created and supported the public school system. Dr. Von Schaaf and the entire school was walking a road it had never traveled before, nor has anyone else.

Nevertheless, the decision on September 8, 1970 was that of Dr. Von Schaaf. He made the decision. No school disruptions followed. But Rod Melton did have to forego wearing his Confederate patch.

Every aspect of Dr. Von Schaaf's judgment was questioned in depth before the Federal District Court, and he was vindicated.

The principal's judgment was reviewed by the Court of Appeals and again his judgment was found to be supported by the record.

Now the petitioners would seek a fourth governmental evaluation of the propriety of an action on September 8, 1970 and on a written record with all of its inherent defects. Such does not appear to be a proper use of the appellate procedures nor of the time of the United States Supreme Court. The factual conclusions of both the District Court and the Court of Appeals support the decision reached below.

CONCLUSION

For the reasons set forth above, certiorari should be denied.

Respectfully submitted,

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